



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, DC 20460

OFFICE OF
GENERAL COUNSEL

February 4, 2022

MEMORANDUM

SUBJECT: Impartiality Determination to Participate in Certain Specific Party Matters
Involving DC Water

FROM: Justina Fugh
Alternate Designated Agency Ethics Official and
Director, Ethics Office

TO: Adam Ortiz
Regional Administrator
Region 3

As Regional Administrator for the United States Environmental Protection Agency (EPA) Region 3, you seek permission to participate in specific party matters involving the District of Columbia Water and Sewer Authority (DC Water). Within the last year, prior to being selected for this position, you served as a principal board member, representing Montgomery County, your employer at that time.

Pursuant to Executive Order 13989 and the Biden Ethics Pledge that you signed upon appointment, political appointees are prohibited from participating in specific party matters in which their former employer or former client is a party. However, state governments and their agencies are excluded under the definition of “former employer.”¹ Because your service on the DC Water board was on behalf of Montgomery County, we have determined that the Ethics Pledge does not apply. What remains is an impartiality concern.

The applicable ethics rules are set forth in the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, specifically Subpart E, “Impartiality in Performing Official Duty.” Upon assuming the position of Regional Administrator, you have a “covered relationship” with DC Water pursuant to 5 C.F.R. § 2635.502(b)(1)(iv). For one year after October 29, 2021, when you resigned from the DC Water Board, absent an impartiality determination from an EPA ethics official, you cannot participate in any specific party matter in which it is a party or represents a party if that matter is likely to have a direct and predictable effect upon DC Water or if the circumstances would cause a reasonable person with knowledge

¹ See Exec. Order 13989, Section 2(k), which provides that “‘former employer’ does not include...State or local government.”

of the relevant facts to question your impartiality. *See* 5 C.F.R. § 2635.502(a).

Federal ethics regulations permit federal employees to participate in matters that might raise impartiality concerns when the interest of the federal government in the employee's participation outweighs concern over the questioning of the "integrity of the agency's programs and operations." 5 C.F.R. § 2635.502(d). The factors that the Agency takes into consideration are:

- (1) the nature of the relationship involved;
- (2) the effect that resolution of the matter will have upon the financial interest of the person affected in the relationship;
- (3) the nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
- (4) the sensitivity of the matter;
- (5) the difficulty of reassigning the matter to another employee; and
- (6) adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

As Regional Administrator, you lead the Region and are part of the Agency's political leadership team. You will be asked to participate in discussions and meetings related to particular matters that affect the Region, including the District of Columbia and its agencies. Because I conclude that the interest of the United States Government in your participation outweighs any concerns about your impartiality, I am authorizing you to participate as Regional Administrator in particular matters that involve DC Water, so long as they are not the very same specific party matters that you worked on personally and substantially for DC Water. In making this determination, I have taken the following factors into consideration:

Nature of the relationship involved – Your connection to DC Water arises by virtue of your employment with Montgomery County, Maryland. The District, like many states, shares responsibility with EPA in protecting human health and the environment. With respect to many of our statutes, EPA has directly delegated states with regulatory and enforcement authority. In fact, EPA, through its regions, works closely and directly with states on a continuing and frequent basis, including through their utility and regulatory agencies.

Effect of the matter upon your financial interest – You do not have any financial interest with respect to DC Water.

Nature and importance of the employee's role – In your role as Regional Administrator, you will be responsible for the District of Columbia as well as the Region's five states and its tribal nations. You will be expected to communicate freely with all of the entities in your region, including the District of Columbia and its agencies, including DC Water.

Sensitivity of the matter – We anticipate that there will be specific party matters in which you may be asked to participate, including ones that merit your participation and raises nationally significant issues.

Difficulty of reassigning the matter to another employee – Your participation in regional matters and nationally significant issues will be of importance to the Administrator.

While we have issued you this determination to interact with DC Water, so long as you are not working on specific party matters that you participated in personally and substantially while on the board of DC Water, nothing in this impartiality determination should preclude you from choosing to recuse yourself voluntarily, although you are advised to confer with OGC/Ethics or your regional ethics counsel should such a circumstance arise.

This authorization will remain in effect for the remainder of your cooling-off period. After October 29, 2022, you will no longer have a covered relationship with DC Water under the impartiality standards and will no longer require this determination.

If you have any questions regarding this determination, or if a situation arises in which you need advice or clarification, please contact Victoria Clarke at clarke.victoria@epa.gov or me at fugh.justina@epa.gov.

cc: Diana Esher, Deputy Regional Administrator
Allison Gardner, Acting Regional Counsel
Phil Yeany, Team Lead for Ethics
Justina Fugh, Director, Ethics Office